

Department of Justice Announces Department-Wide Safe Harbor for Voluntary Self-Disclosures Discovered During the M & A Process

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On October 4, 2023, the Deputy Attorney General Lisa O. Monaco announced that the Department of Justice (“DOJ”) has adopted a new department-wide Mergers and Acquisitions Safe Harbor Policy (the “Safe Harbor Policy”) to encourage acquiring companies in M & A transactions to voluntarily self-disclose criminal misconduct discovered during the acquisition process. Under the Safe Harbor Policy, acquiring companies will receive a presumption of declination—a decision by the DOJ not to pursue prosecution— if they:

- Promptly and voluntarily disclose criminal misconduct at the acquired entity within six months from the date of closing;
- Cooperate with the ensuing DOJ investigation; and
- Engage in timely and appropriate remediation, restitution, and disgorgement.

The Safe Harbor Policy only applies to criminal misconduct that is discovered in bona fide, arms-length M & A transactions.

The Safe Harbor Policy does not apply to (a) misconduct that was otherwise required to be disclosed, already public, or known to the DOJ; or (b) civil merger enforcement.

The Safe Harbor Policy applies department-wide and “[e]ach part of the Department will tailor its application of this policy to fit their specific enforcement regime and will consider how this policy will be implemented in practice.”

The Safe Harbor Policy requires that the acquiring company disclose the misconduct within six months from the date of closing, this applies whether the misconduct was discovered pre- or post-acquisition. Acquiring companies will have a baseline of one year from the date of closing to fully remediate the misconduct. The baseline timeframes of disclosure and remediation are subject to a reasonableness analysis and the DOJ may extend these timelines on a case-by-case basis pursuant to the specific facts, circumstances, and complexities of the transaction.

The presence of aggravating factors at the acquired company will not impact the acquiring company’s ability to receive a declination. Unless aggravating factors exist at the acquired company, the acquired entity can also qualify for applicable voluntary self-disclosure benefits, including potentially a declination

. Any misconduct disclosed under the Safe Harbor Policy will not be factored into future recidivist analysis for the acquiring company.

Deputy Attorney General Monaco explained that “the last thing the Department wants to do is discourage companies with effective compliance programs from lawfully acquiring companies with ineffective compliance programs and a history of misconduct.”

For healthcare transactions which are subject to a variety of risks from state and federal fraud and abuse, reimbursement, licensure, and privacy laws, the Safe Harbor Policy places a greater emphasis on the buyer’s timely due diligence and integration efforts.

Specifically, buyers should prioritize timely due diligence efforts to identify areas of potential misconduct. To the extent misconduct is discovered, buyers should be prepared to provide compliance integration and remediation to correct or mitigate the misconduct within the baseline timeframes and applicable healthcare industry standards. If misconduct is identified, buyers must agree to restitution and disgorgement that results from the identified misconduct to receive the presumption of declination. These potential financial losses may in turn result in additional considerations and negotiations at the deal table.

On the sell side, healthcare sellers should be identifying risks and discussing strategic options to the extent they are aware of potential misconduct prior to beginning the sale. Healthcare sellers should also weigh the risks of voluntary self-disclosure against the risks of exposing the company’s misconduct to other agencies not controlled by the DOJ.

Notably, other agencies such as the Department of Health and Human Services Office of Inspector General, Centers for Medicare and Medicaid Services, and the Food and Drug Administration may have an interest in imposing administrative remedies on the self-disclosing company based on the identified misconduct. It is unclear at this time what those administrative remedies will look like when a company self discloses and whether the voluntary self-disclosure will have any effect on such remedies.

For all transactions moving forward, the DOJ highlighted that “compliance must have a prominent seat at the deal table if an acquiring company wishes to effectively de-risk a transaction.”

For further information regarding the Safe Harbor Policy and its effect on your healthcare transactions, please reach out to the Benesch Healthcare+ team.

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